Supreme Court, U. S.
FILED
SEP 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1245

UNITED STATES OF AMERICA, Et Al. - Petitioners

versus

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank of Middlesboro, Kentucky - - - - - - - Respondent

---

On Writ of Certiorari from the Judgment of the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE RESPONDENT

WILLIAM A. WATSON
WATSON & WATSON, Attorneys
1911½ Cumberland Ave.
Middlesboro, Kentucky. 40965
Attorneys for the Respondent

WESTERFIELD-SONTE CO., INC., 919 W. KENTUCKY, LOUISVILLE, KY.

INDEX

PAGE

Issues Presented for Review 2

Statement of the Case 2– 4

Argument—

I. The Summons as Drawn Is Unenforceable Because It Is Directed to an Individual Bank Employee Who Has Testified Without Contradiction That He Does Not Know How the Currency in Question Came to the Bank 4– 6

II. Neither Section 7601 Nor 7602 Constitutes Specific Statutory Authority for the IRS to Secure a Summons for Information Pertaining to a Yet Undefined, Possible Illusory Class of Persons Whose Potential Tax Liability Is Merely Based Upon a Figment of a Special Agent's Yet Unsubstantiated Imagination 7–18

III. The Fourth Amendment Requires That a Summons to Produce Records Under Section 7602 of the Internal Revenue Code Particularly Describe the Records Summoned and That Those Records Be Relevant to the Tax Liability of Particular Persons Under Investigation. A Summons Which Requires a Third-Party Bank to Produce All Deposit Tickets of Every Person in a Broadly Defined Class of Depositors Merely to Ascertain the Identity of All Persons in That Class Does Not Meet These Requirements and Cannot Be Enforced 18–23

Conclusion 23–25

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1245

UNITED STATES OF AMERICA, Et Al. - *Petitioners*

v.

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank of Middlesboro, Kentucky - - - - - *Respondent*

ON WRIT OF CERTIORARI FROM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

ISSUES PRESENTED FOR REVIEW

There are two questions presented for review and they are as follows:

I. Whether a Special Agent of the Internal Revenue Service has the authority under Sections 7602 and 7601 of the Internal Revenue Code of 1954 to issue a "John Doe" summons against a bank which required the bank to produce records pertaining to a designated class of transactions which the bank *may* have had with its customers, when the Special Agent admits that the "taxpayer" named in the "John Doe"

summons is both an unknown person and fictitious and that no person or persons is under investigation.

II. Whether the Section 7602 summons the trial court ordered to be enforced constituted an unreasonable search or seizure under the Fourth Amendment.

STATEMENT OF THE CASE

It is important to keep in mind a few facts that are basic to a determination of the issue here. Petitioner does not contend that any depositor of Commercial Bank, respondent's employer, has failed to make a correct federal income tax return, or failed to make a return at all, or that any depositor has failed to pay a tax liability. The special agent who issued the summons here proceeds upon curiosity—curiosity predicated upon a suspicion based upon an inference, founded, in turn, upon still another inference, thus: old and badly worn money was submitted to a federal reserve bank, and this kind of money could have achieved its condition through storage (the first inference) (App. 20), and because people sometimes store money secretly upon which the tax has not been paid (the second inference), then maybe this money was brought to the bank by a depositor who had kept it for a long time in a secret place rather than put it in a bank where it could be found or traced and his tax delinquency ascertained (the suspicion). Without attacking the soundness of the syllogism (which would seem to be defeated by the fact that the money was put

in circulation, presumably by someone not afraid to do so), it is apparent that Special Agent Brutscher is attempting to use Section 7602 as the imprimatur for unlimited access to confidential bank records.

Also, we use the term "depositor" here as distinguished from the term "customer" because a customer could be anyone who does business in the bank, including anyone walking in off the street to exchange old money for new, and no record would be made of a cash exchange type of transaction, save only in the mind of the teller who received the cash (App. 37). A "depositor," on the other hand, would be a customer who makes deposits and thereby leaves a record of his transactions. Special Agent Brutscher wants to invade the records of "depositors" for a limited purpose, he says, but yet really without limitation. The type of cash at issue here could, of course, lie in a bank vault indefinitely insofar as the evidence here shows. Neither the chief teller nor any of the individual tellers who might know the identity of a "customer" who brought such a sum of money to the bank was subpoenaed as a witness. Bisceglia is a bank officer, not a teller (App. 35).

The evil of the summons here, as viewed by Bisceglia (even as it was modified by the District Court) is that it expands the Section 7602 power of a special agent to such an extent that there is no limit to the use of the summons—except the whim of the revenue agent who issues the writ.

It is also significant that the petitioner did not, when this matter was before the District Court, predicate the issuance of the summons here upon Section 7601 of the

Code. Only when the case was briefed for the U. S. Court of Appeals for the Sixth Circiut did petitioner develop the argument that the canvassing statute legitimized his use of a John Doe summons.

ARGUMENT

I. The Summons as Drawn Is Unenforceable Because It Is Directed to an Individual Bank Employee Who Has Testified Without Contradiction That He Does Not Know How the Currency in Question Came to the Bank.

One aspect of this case seems largely to have been ignored by the parties and the lower Courts in the briefs and opinions rendered previously in this litigation, although certainly the facts are undisputed. The summons directed to Bisceglia (not the bank) calls for him to disclose those bank records "which will provide information as to the person(s) or firm(s) which deposited, redeemed (sic), or otherwise gave to Commercial Bank . . ." (App. 8, 9). The summons, therefore, not only commands the production of bank records but specifically those records which will, in effect, *identify* the bank customer who brought the old money to the bank. Records, of course, are mute, inorganic objects. They reflect what someone puts on them. The testimony here does not show that customers' deposit tickets would reflect anything more than the name, address, and date of the deposit, and whether it involved currency, checks, or coin, the usual information. Presumably, a deposit ticket would not have a notation on the margin that the currency was old, thin, or brittle, the conditions which aroused the interest of the em-

ployee of the Federal Reserve Bank at Cincinnati, Ohio, who brought this matter to the attention of the IRS. The evidence shows that Bisceglia is a loan officer, not a teller (App. 35). He testified without contradiction that he knew nothing of this affair until he heard it discussed generally in the Bank (App. 42). He said he did not know the origin of the money (App. 36). If others did, they were not made parties to this proceeding, summoned by the IRS, or subpoenaed as witnesses in the District Court. No record would exist to identify the patron who made a cash exchange (App. 37).

Hence, the summons as drafted, in view of the evidence, is unenforceable because it requires *personal* judgment, a determination by a single bank employee which he says he cannot make—the *identity* of the person or persons who made a deposit or an exchange of certain currency, *specific* currency. Even if all bank records, including deposit tickets, were produced, the evidence does not show that Bisceglia could make the identification desired by the IRS. The summons may say "provide information", but it means to identify the responsible customer or else to point the finger of suspicion at all customers in a possibly broad class. The burden of proof is on the United States of America to show that Bisceglia could, through his own knowledge, or using the records, provide the information. Failing to do this, can petitioner ask this Court to order Bisceglia to make a judgment that is nothing more than speculative? Can it order him to breach, on a wholesale basis, its confidential relationship with an entire

class of customer? In *California Banker's Assn.* v. *Schultz,* No. 72-985, decided April 1, 1974, the Court, while recognizing that incorporated associations cannot plead an unqualified right to conduct their affairs in secret, did say that they should have protection from unlawful demands made in the name of public investigation, citing *Federal Trade Comm'n.* v. *American Tobacco Co.,* 264 U. S. 298, 68 L. Ed. 696.

There may be many deposits during the period in question which consist of currency in the amount of $20,000 or in $100 denominations exceeding $5,000, the basis of the order to comply fashioned by the District Court. On the evidence, then, shall Bisceglia disclose them all? If he complies with the District Court's order, he can do no less. Does he have the right to do this? Does the IRS have the right to make him do it? If this can be done, the confidentiality of bank records is a nullity. More importantly, the evidence produced by petitioner itself defeats any notion that Bisceglia can "provide the information" required by the summons here. He can only surmise, and open a Pandora's box of federal inquisition into depositors' affairs.

II. Neither Section 7601 Nor 7602 Constitutes Specific Statutory Authority for the IRS to Secure a Summons for Information Pertaining to a Yet Undefined, Possibility Illusory Class of Persons Whose Potential Tax Liability Is Merely Based Upon a Figment of a Special Agent's Yet Unsubstantiated Imagination.

The argument of petitioner here is, in essence, that there really is no limitation upon the authority of a revenue agent to obtain records through the use of the summons authorized by Section 7602 of the Code. If, as petitioner argues, Section 7601 of the Code is a sweeping authorization for canvassing every citizen of the United States as to his tax liability and Section 7602 is merely the instrumentality to be used in effecting the canvassing activities prescribed by the preceding section, then the first paragraph of Section 7602 could have been eliminated. In other words, instead of beginning Section 7602 with the words "for the purpose of ascertaining the correctness of any return, making a return when none has been made, determining the liability of any person for any revenue tax * * * or collecting any such liability, the Secretary or his delegate is authorized"—the Congress *could* simply have said that for the purpose of implementing the authority granted under 7601 the Secreary is authorized to . . ., and then rectie the power set up in Subparagraphs (1), (2), and (3) of Section 7602; but, the Congress did not do this. Instead Congress listed several specific grounds upon which the Secretary could exercise the authority vested by Section 7602. This would seem to rebut the attempt now by the

Secretary to use the canvassing statute as a basis for his argument that the use of the summons is without any limitation outside his own discretion. The lower Court felt this was the proper interpretation, and the Fifth Circuit also arrived at the conclusion that Section 7601 was merely a general admonition to the Secretary as to his general duties and not a specific authorization of power to be read into Section 7602. *United States* v. *Humble Oil and Refining Co.*, 488 F. 2d 953, 960 (5th Cir. 1974), petition for certiorari pending, No. 73-1827.

This is the only reasonable interpretation to put upon Section 7602 for, otherwise, the potential for abuse inherent in the Secretary's argument is rather terrible to consider. Under the interpretation for which petitioner now argues it would not make any difference whether we were talking about a case involving old and deteriorated bills which may have been stored and for which no tax might have been paid. We could be talking about any type of record which a revenue agent's curiosity might impel him to explore, whether or not it be for a lawful congressional purpose —he can demand anything because he is canvassing the territory. We have to believe that there are few members of the Congress who have such an abiding faith in human nature that they would cloak any other mortal with such invincible authority. Indeed, we would question whether the Congress could make such a grant of power if it chose to do so. Under such circumstances, the members of the legislative branch would be saying to the Secretary and his agents: "You go anywhere, do anything, invade any transaction, secure the most private records, and you alone are the judge of your

actions." To state the proposition condemns it. If phrased in that type of language, the congressional grant of authority would violate all of the due process requirements of our constitutional system and would be without cavil an invasion of privacy and an unreasonable search and seizure if exercised. It was for this reason, surely, that the Congress, in drafting Section 7602, established very specific grounds upon which the summons authority could be used, and we think it is quite implicit in those grounds that there must be a known taxpayer involved before such a writ issues; for, if no particular taxpayer need be established (this case aside) and we assume in the Secretary an unlimited authority, then, by definition, such power is an unreasonable power, and contrary to all the presumed and lawful intentions of the legislative branch.

The petitioner has cited a great deal of authority in support of his argument here; but virtually all of the cases upon which he relies, fall into the tax preparer category in which the Secretary has been investigating people who prepare tax returns for hire and who have been found to prepare returns improperly. All of these cases may be distinguished from the case at hand in that in those cases there were known taxpayers whose returns had been filed by the tax preparer under investigation, and the identity of the taxpayer was already known to the Commissioner through the returns themselves. It was simply convenient there to get the identity of the taxpayers directly from the preparer of the return and thereby expedite what would, otherwise, be a tedious job of going through

IRS records to come up with the same data. Indeed, in *United States* v. *Berkowitz,* 488 F. 2d 1235 (3rd Cir. 1973), petition for certiorari pending, No. 73-1175, the Third Circiut itself distinguished the case from this case on that basis. The Third Circuit said also in *Berkowitz,* in distinguishing that case from this one:

> ". . . Furthermore, since the regulations require that a return prepared by a commercial tax preparer be identified as such, the data which the forms seeks is required by law in any event."

Another obvious distinction between the situation here and that type of case is that in investigating tax preparer firms the inquiry was based on *concrete* preliminary investigation which had *established* misconduct on the part of the accounting firm. There was an unequivocal basis to believe there that the tax preparer had complied income tax returns improperly and denied the government a tax due. It did not involve delving generally into the records of uninvolved taxpayers on the suspicion or chance that someone, ultimately, might be found to have evaded income tax. Indeed, in those cases, the Commissioner had gone so far as to establish *probable cause* to believe the tax preparer firm had erred in its work on other occasions by sending a revenue agent in with certain data to have a tax return prepared using same and having determined in this way that the firm which did the work had made substantial errors in compiling the return to the detriment of the public treasury. And even in the Fourth Circuit, in *United States* v. *Theodore,* 479 F. 2d 749 (1973) at page 755, the Court held Section

7602 *"only allows IRS to summon information relating to the correctness of a particular return or to a particular person and does not authorize the use of open-ended Joe Doe summonses."* (Emphasis Ours)

In those cases other than the tax preparer type of case where the Court has sustained the summons directed at determining the identity of the taxpayer, the facts will show that it was known that there was a taxpayer in existence, as in *Tillotson* v. *Boughner,* 333 F. 2d 515 (7 Cir., 1965), certiorari denied, 379 U. S. 913, where an attorney had delivered a check to the Secretary to cover taxes of the individual taxpayer thus precipitating an investigation as to the further tax liability of a known taxpayer who simply had not been identified by name.[1]

---

[1]The Court in *Humble* directly disapproved the dicta in *Tillotson* v. *Boughner,* 333 F. 2d 515 (7 Cir. 1965), which dismissed objections to the "john doe" summons in remarking that Section 7601(a) authorized the Internal Revenue Service to "investigate" taxpayers, and that Section 7602 was designed to implement Section 7601(a), the government's argument before this Court. In *Humble* the Court said the more compelling view was the contrary position expressed in *Biscelgia.* In footnote 2 of Judge Blumenfeld's opinion in *United States* v. *Armour, infra,* he also distinguished and limited the holding in *Tillotson,* when he said: ". . . [T]he court's focus (in *Tillotson*) was on the fact that the Service was investigating an actual person or persons who had admitted owing substantial back taxes, and *not an undefined, possibly illusory class of persons whose potential tax liability was merely a figment of the Service's as yet unsubstantiated imagination* (in *Bisceglia*)." [Emphasis and additions supplied.] The petitioner in the case at bar would overlook and soft-pedal the fact that maybe more than one person or taxpayer was involved in the subject transactions. Since there is no evidence as to how many taxpayers or persons were connected with the transaction, the relevancy requirements of *United States* v. *Powell,* 379 U. S. 484 (1964) are thrown out the window. Thus, the information requested must necessarily relate to a class or group as yet unidentified. Judge Blumenfeld was obviously correct in saying the subject case was a fishing expedition if there ever was one. See, *infra.*

In *United States* v. *Armour,* 74-1 U.S.T.C. ¶9479 (D-Conn.), cited by petitioner in footnote 9 in its brief, the facts again are distinguishable from those in this case since there, having reversed itself on a tax ruling, the IRS wanted to know the identity of shareholders of a corporation who had been granted and then denied certain tax benefits resulting from a stock transaction. The IRS knew at the time it made its ruling that there were shareholders who would be affected by it, and only their names were unknown; but determining the *precise* identity of the stockholders was basically a ministerial act. Certainly, it did not encompass the broad exercise of authority which petitioner seeks here.

Indeed, the District Court judge said in that case,

> ". . . As far as can be judged from the opinion of the Court of Appeals (in *Bisceglia*), this was a fishing expedition if ever there was one, not only because the IRS had no idea of the identity of the depositor(s) but also because the IRS lacked any knowledge of the sort of tax liability which the depositor(s) might possibly have incurred, and could not even indicate with any specificity the particular records it wished to produce." (Additions added)

So, rather than constitute an authority for the government's position here, the District Court, in *Armour,* made a clear and rather emphatic distinction between the situation in that case and the facts here, and the case does not stand as authority for the proposition urged by the United States in this proceeding.

The District Court, in *Armour,* did not say that all John Doe summonses are invalid if the taxpayers involved are *identifiable,* as in *Armour,* on the basis of common characteristics such as owning shares of stock in a specific corporation on a specific day—and this identifying characteristic was set forth on the face of the summons. We do not argue with that distinction, and it is essentially the same distinction that the various Courts of Appeal have made in the tax preparer type of case.

As far as counsel knows, only two circuits have confronted the precise issue which is now before this Court, the Sixth Circuit in this case and the Fifth Circuit in *Humble Oil & Refining Co., supra,* although the Third Circuit in *Berkowitz, supra,* could be deemed to agree since that Court did not quarrel with the Sixth Circuit while distinguishing its case on the facts. Other authority exists where Courts have denounced overbroad summons—*United States* v. *Giordano,* 419 F. 2d 564 (5th Cir., 1969) certiorari denied, 397 U. S. 1037, and *First National Bank of Mobile* v. *United States,* 160 F. 2d 532 (5th Cir., 1947), even though the Secretary, no doubt, thought there, as here, that all the records would tell him something. But, if an overbroad request for records must fail, then certainly a request for *all* the records of a certain class of the bank's depositors would also succumb to that rule.

The Sixth Circuit also noted *Mays* v. *Davis,* 7 F. Supp. 596 (WD-Pa. 1934) decided under the predecessor section of 7602 where exploratory "suspicion" use of the summons power was forbidden.

In each other case, on different fact situations, the appellate Courts decided that Congress did not intend that the Secretary could take a summons and go about examining records (and through these records to identify a taxpayer or taxpayers) where no taxpayer was under investigation or known to have done anything wrong but simply in the hope or prospect of finding something that could incriminate someone and/or satisfy the curiosity of the agent conducting the investigation. Petitioner says this is bad law and would severely hamper the exercise of the dealings of the Secretary's office if these cases are not overturned and the sweeping authority sought is not granted. Petitioner has the problem, obviously, of attempting to rewrite the enabling statute (Section 7602) by interpretation (or asking this Court to do so) when confronted with the reality that a literate and, no doubt, perceptive Congress did not frame the statute in language suggesting such a purpose.[2]

The petitioner has indulged in his brief in a rather lengthy recitation of the history of the present Code section, but to state the matter very succinctly, we do not see anything in the language cited from any of the preceding section or administrative hearings which

[2]A little different twist was presented in *United States* v. *Matras*, 487 F. 2d 1271 (8 Cir. 1973), wherein the Court held the government had failed to sustain its burden of proof in showing that the taxpayer's company-wide budgets were relevant to the Service's audit of the company's consolidated returns after applying the relevancy tests set forth in *United States* v. *Powell*, 379 U.S. 484 (1964). In deciding against the government, the Court said that "relevant" connotes and encompasses more than "convenience." Therefore, the Court refused to permit the government to have access, under Section 7602, to the taxpayer's budgets although the agent assured the court that the budgets would provide a "road map" through the company's returns.

sustain his argument. We cited the Court in our reply to the petition for a writ of certiorari some pertinent language from hearings conducted by the Congress which, in fact, tend to rebut the petitioner's argument and to show, we think conclusively, that the Congress clearly did not intend to grant the authority sought here. We will quote here again certain language of the Assistant Secretary of the Treasury from testimony given in June, 1970, before the Committee on Financial Institutions of the Senate Banking and Currency Committee held with respect to H. R. 15073 and S. 3678 which led to the passage of the Bank Secrecy Act now encoded at 12 USC, Section 1829 (b) and 31 USC, Sections 1051-1122.

In light of this testimony, the respondent is unable to perceive the position the government is now attempting to thrust upon this Court. As a practical matter we see no difference between the situation before this Court as characterized by the Sixth Circuit and the testimony of the Assistant Secretary before the committee of Congress.[3] To illustrate, we quote the language of each. In its opinion, the Sixth Circuit said of the summons the district court ordered enforced:

> ". . . Instead, the IRS has been granted a summons enabling it to inquire into the financial affairs of a group of unspecified persons in the hope of identifying one or more of them as the person or persons who transferred deteriorated bills to the Commercial Bank, a purpose not authorized by section 7602 of the Internal Revenue Code."

[3]Quotation References are to Hearings on S. 3678 before the Subcommittee on Financial Institutions of the Committee on Banking and Currency, 91st Cong., 2d Sess., at page 147, *et seq.* (1970).

And, the Assistant Secretary said [p. 173]:

> "If the Internal Revenue Service could survey the foregoing records of international transactions, either by examining them on the premises of the bank or other financial institutions or by requiring information returns as to some of the contents of the records, the usefulness of the records in providing initial leads to cases of possible tax evasion would be enhanced. *Such surveys, however, would extend the utilization of the records beyond their traditional role as a source of information and evidence in an examination of a particular taxpayer.*"

The information requested in the case at bar as enforced by the trial Court is no different from the general surveys the Assistant Secretary was describing in his testimony before the committee. Mc eover, the Assistant Secretary told Congress that the Internal Revenue Service has not generally asserted such survey authority, the scope of which has not been reviewed by the courts (pp. 173-174).

The sum and substance of our position here is that there is no difference between a summons enabling the IRS to inquire into the financial affairs of a group of unspecified persons and a general survey authorization of a third parties financial records.

This argument is even more forceful when considered in light of the Assistant Secretary's refusal to support legislation which would have granted that general survey authority to the IRS. Such decision was made solely upon the basis that it would amount to an

unnecessary incursion against a citizen's right of privacy and possibly amount to an unreasonable search and seizure under the Fourth Amendment (P. 174). In particular, the prepared statement of the Department of Treasury, said [p. 174]:

> ". . . While it is clear that obtaining records by established discovery procedures from the banks and other institutions in connection with the examination of a *particular taxpayer would not violate these rights, provisions for a survey of such records raises a much more serious question.* * * * . . . For the same reasons that we have concluded that we cannot support new legislative authority for the survey of records not tied to a particular taxpayer investigation, we believe it inappropriate to support legislation requiring reports of information obtained from the records of international transactions" [Emphasis Supplied].

It is clear that the official Treasury Department policy has changed since June of 1970, and that the only statutory authority justifying the petitioner's position before this Court is section 7601(a), the general canvassing statute, and the one issue the government did not raise, plead, or allege in the trial court below.

Since the government specifically refused to sanction the general survey authority provided for in Sections 242 and 241 of S 3678 and H. R. 15073 of the Bank Secrecy Act, we believe this Court should refuse to entertain any contrary position in this proceeding which would give judicial approval for the survey of the financial affairs of a group of yet un-

specified and illusory persons whose potential tax liability is merely a figment of the Service's as yet unsubstantiated imagination. The government's citation of the *Armour* case constitutes ample authority for this contention.

III. The Fourth Amendment Requires That a Summons to Produce Records Under Section 7602 of the Internal Revenue Code Particularly Describe the Records Summoned and That Those Records Be Relevant to the Tax Liability of Particular Persons Under Investigation. A Summons Which Requires a Third-Party Bank to Produce All Deposit Tickets of Every Person in a Broadly Defined Class of Depositors Merely to Ascertain the Identity of All persons in That Class Does Not Meet These Requirements and Cannot Be Enforced.

In *Theodore, supra,* the Fourth Circuit defined and reviewed the Fourth Amendment prohibition against unreasonable searches and seizures. In that proceeding, the particular summons was deemed to be unprecedented in its breadth, in that the Service was attempting to secure copies of all of the returns for Theodore's clients for the years 1969, 1970, and 1971 in addition to all records, memos, workpapers which pertained to those returns. The undisputed facts in the record showed that this would require the taxpayer to produce some 1,500 returns with accompanying documentation.

After reviewing the authorities, the Court in *Theodore* said [479 F. 2d 754]:

> "A summons will be deemed unreasonable and unenforceable if it is overbroad and disproportionate to the end sought. United States v. Harrington, 388 F. 2d 520 (2 Cir., 1968). The government cannot go on a 'fishing expedition' through appellants' records (citing cases), and where it appears that the purpose of the summons is a 'rambling exploration' of a third party's files, it will not be enforced (Citing case). Indeed, we agree with Judge Lumbard that '[t]his judicial protection against the sweeping or irrelevant order is *particularly appropriate in matters where the demand for records is directed not to the taxpayer but to a third-party who may have had some dealings with the person under investigation. United States* v. *Harrington, supra* [Emphasis Added].

It is not surprising that the Fourth Circuit held held the summons was overbroad and disproportionate to the ends sought. In fact, the Court noted in its opinion that the Internal Revenue Service is not to be given the unrestricted license to rummage through the office files of an accountant in the hope of perchance discovering information that would result in increased tax liabilities for some as yet unidentified client. Moreover, the Court specifically concluded that a section 7602 summons was not meant to give the IRS such *investigative* and *inquisitorial* power.

The critical portion of the Court's opinion on *Theodore* was that the particular summons was overbroad and disproportionate to the ends sought, in that a section 7602 summons only allows the Service to ac-

quire information pertaining to the correctness of a particular return, or to a particular person, and does not authorize the use of an open-ended John Doe summons to acquire copies of returns. The controversy arose in *Theodore* as a result of the Service's nationwide tax preparer's project. An undercover agent visited the accounting firm posing as a client. The accounting firm prepared an incorrect tax refund claim. An investigation ensued. The facts and circumstances surrounding the issuance of the 7602 summons there is, and was, a world apart from the facts and circumstances surrounding the issuance of the summons in the case at bar. The summons in *Theodore* was issued because an incorrect claim for refund had been prepared by the firm on the information furnished by the government's undercover agent. Here, the summons was issued merely because of the "heady fantasy" of the IRS in seeking to find out whether or not there might have been some merely possible tax liability attaching to the deposit of $40,000 in aged currency (*Armour, supra,* at 84,255).

There are many other cases which discuss the Fourth Amendment prohibition against unreasonable searches and seizures. The "relevancy" requirement is discussed at length in *Venn* v. *United States,* 400 F. 2d 207 (5 Cir., 1968) and adopts approvingly the "relevancy" standard of *Harrington.* The "particularity" requirements of the Fourth Amendment standards is discussed in *Hubner* v. *Tucker,* 245 F. 2d 35 (9 Cir., 1957). The lesson contained in all of these cases clearly shows that to summon a bank to produce *all* deposit

tickets of *every* depositor who may have made certain types of deposits over a specified period of time hardly meets the "particularity" demand of the Fourth Amendment in that each document required to be produced must be identified with at least enough detail to enable a Court to determine whether or not it is relevant to the tax liability of a specific taxpayer, or whether such information pertains to the specific taxable transaction. Such is true in the case at bar because the Service may not constitutionally investigate an undefined, possibly illusory, class of persons whose potential tax liability was merely a figment of the Service's as yet unsubstantiated imagination.

We note that in the Sixth Circuit's opinion below and in the opinion of the Fifth Circuit in *Humble,* the Third Circuit in *Berkowitz,* and the Fourth Circuit in *Theodore,* the judges adhered generally to explanation of their opinions in terms of logical interpretation of the words of the statute; and, indeed, this type of issue is not, as the Fifth Circuit pointed out in *Humble,* a "scope of the summons" case but a "statutory authority issue," and so it is entirely proper to pick precisely over the language of the statute and the administrative notes and history of same in trying to decide what it means, and what the legislative branch intended when it wrote these particular words. But we sense, and we think perhaps the Court will sense, in reading all of these opinions variously arriving at the same conclusion, i.e., that in the absence of a particular known taxpayer, even though his identity may be unknown, there can be no use of the summons to discover

a possible taxpayer, we think there is the ineffable presence of a sense on the part of these Courts of a constitutional danger which is inherent in any grant of arbitrary power. Neither the Court below, nor the Fifth Circuit in *Humble,* reached the constitutional issue, although it was raised in this case and in Humble in the District Court and at the appeals level. Because of the issue of statutory construction, the Courts adhered to the meanings of words and did not express, we believe, something which may have been on their minds in the constitutional realm. Perhaps we divine that which does not exist, or perhaps the constitutional issues were simply too philosophical and the Courts declined to reach out for them.

We cannot say, but we do not agree, that the constitutional issue is an insubstantial one as petitioner argues on page 36 of his brief because the District Court narrowed the enforcement order. The narrowing of the original summons only touched the reasonableness issue in terms of the volume of material that the bank should produce. It did not reach the reasonableness issue in terms of determining whether a John Doe summons, absent the investigation of any known taxpayer or even the existence of a culpable class of taxpayer, is reasonable within the meaning of the Fourth Amendment to the Constitution of the United States. That issue remains, and it will remain, if this Court does not reach it here. We noticed in our first argument that this Court, in *California Bankers Assn.* v. *Schultz, Supra,* recognized that corporations should

have protection from unlawful demands made in the name of public investigation. Is there a limit beyond which the privacy of a citizen in transacting business with his bank cannot be explored by a curious government agent? We think there must be, and we think the fact that there is such a limit is clearly stated in that authority, but now it must be defined and applied to the circumstances of the case at bar.

CONCLUSION

The respondent contends that the summons issued by Special Agents Brutscher was not issued pursuant to the statutory authority of Section 7602 of Title 26, U. S. Code, because it was in the nature of a John Doe summons seeking a blanket disclosure of confidential bank records compiled in transactions which had occurred between the bank and its depositors over a substantial period of time, without establishing any relevancy between the record sought and the possible tax liability of any citizen. Indeed, there was no investigation underway concerning any taxpayer, or any class of taxpayer. The purpose of the summons was in the nature of the broadest type of exploratory inquiry designed to satisfy the curiosity of the revenue officer and unrelated to any official investigation. In addition to exceeding the clear legislative intent by using the summons in this way, and therefore exceeding the statutory authority granted in Section 7602, the use of the summons as drawn under these circumstances would

clearly constitute an overbroad exercise of the summons authority and would violate the constitutional protection afforded by the Fourth Amendment to the Constitution of the United States. While the latter issue is not determined below, nor in *Humble,* the issue was raised and has been presented here by the government, and we think it is another valid basis for affirming the decision of the Sixth Circuit.

We argued in this brief, and we reiterated here, that summons as drawn is unenforceable because it directed a particular bank employee to provide information that would identify the person or persons who brought this money to the bank either as a deposit or exchange in currency or otherwise. The evidence shows that the particular employee, respondent in this case, testified without contradiction that he knew nothing about the transaction, and it is clear that the only thing he could do would be to produce records of the bank pertaining to a broad class of depositors and present these to the special agent which, in turn, would subject all persons in the class to the scrutiny of the IRS and, no doubt, an audit of their tax affairs. This demonstrates, again, the overboard nature of the summons in the constitutional sense and it also demonstrates the invasion of the bank's confidential relationship with its depositors. There is no relationship between the broad scope of this summons and the *possible, ultimate* particular investigation that may, sometime in the future, be launched. This, again, demonstrates the fact that petitioner here argues for, in essence, an abolition of any restraints

upon his power to use the summons authority to invade the private lives of citizens. The Court should affirm the decision below.

Respectfully submitted,

WILLIAM A. WATSON
WATSON & WATSON, Attorneys
1911½ Cumberland Ave.
Middlesboro, Kentucky 40965

Attorneys for the Respondent